Supreme Court, U. S.
FILED
JAN 11 1980
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IN THE

Supreme Court of the United States

October Term, 1979

NO. 79-1089

Russell A. Smith,

Petitioner

vs.

United States of America,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. The decision below is in conflict with the decisions of this Court and those of the other circuits, and the Court needs to squarely address the issue, and provide guidance, on what is a "fair and just" reason for withdrawing a guilty plea prior to sentencing allowing a Defendant to assert his constitutional guarantee of a jury trial 5

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IN THE

Supreme Court of the United States

October Term, 1979

NO.

Russell A. Smith,

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vs..

United States of America,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners, in support of their Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, respectfully show, as follows:

OPINIONS BELOW

The orders and opinions sought to be reviewed were entered in the United States Court of Appeals for the Fifth

Circuit ("Fifth Circuit") and are appended hereto as Appendix A. All other orders, judgments, and opinions entered in this action both in the Fifth Circuit and the United States District Court for the Northern District of Texas are appended collectively as Exhibit B. None is yet reported.

GROUNDS FOR JURISDICTION

This Court has jurisdiction under 28 USCS § 1254 (1). This petition is filed within thirty days of the entry of the Order denying Petitioner's Motion for Rehearing and Suggestion of Rehearing En Banc as required by statute.

QUESTIONS PRESENTED FOR REVIEW

A. Whether a Defendant should be permitted to withdraw a guilty plea on a motion made prior to sentencing, when the Defendant has had ineffective assistance of counsel coupled with additional circumstances showing a "just and fair" reason for withdrawal, especially when there is no showing of substantial prejudice by the government?

B. Whether a Defendant is afforded due process when omissions from the transcript of the guilty plea arraignment proceedings are not corrected until after newly retained counsel, in reliance on the incomplete transcript, have presented Defendant's withdrawal motion and filed his brief on appeal – and then such correction is made without hearing and after Defendant has opposed such change and requested a hearing?

CONSTITUTION PROVISIONS AND STATUTES INVOLVED

.The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of grand jury . . . nor be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Federal Rules of Criminal Procedure, Rule 32(d) provides:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the Defendant to withdraw his plea.

STATEMENT OF THE CASE

(i) Course of Proceedings and Disposition in the Courts below

On September 20, 1978, Russell A. Smith and others were indicted for violations of Title 18, United States Code, Sections 2, 371, 1341, and 1343. On September 28, 1978, Russell Smith was arraigned before Judge Sarah T. Hughes and pleaded guilty to counts 1, 4, and 11 of the indictment. On January 26, 1979, prior to sentencing, Russell A. Smith filed a Motion to Withdraw Plea of Guilty. On February 8, 1979, Russell A. Smith's "Motion to Withdraw Plea of Guilty" was denied by Judge Sarah T. Hughes. On February 9, 1979, Russell A. Smith filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit from the District Court's denial of his "Motion to Withdraw Plea of Guilty". On February 9, 1979, Russell A. Smith was convicted and filed Notice of Appeal from the judgment of conviction. These appeals were consolidated by the Fifth Circuit. (App. 7a) On October 23, 1979, the United States Court of Appeals for the Fifth Circuit, without oral argument, affirmed this conviction by percuriam opinion. (App. 2a) On December 13, 1979, Petitioners Motions For Rehearing and Suggestion for Rehearing En Banc was denied. (App. 1a)

(ii) Statement of Facts

In lieu of a statement of facts setting forth specific matters, we have incorporated these facts in the argument for ease of reference.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is In Conflict With The Decisions Of This Court And Those Of The Other Circuits, And The Court Needs To Squarely Address The Issue, And Provide Guidance, On What Is A "Fair And Just" Reason For Withdrawing A Guilty Plea Prior To Sentencing Allowing A Defendant To Assert His Constitutional Guarantee Of A Jury Trial.

Our system of criminal justice is designed to protect the public while also protecting the constitutional rights of the accused. There are many constitutional guarantees designed to keep the innocent from being convicted. The primary and most fundamental protection that the accused has is the right to a jury trial and the right to have effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution. This includes the "right not to plead guilty" *United States v. Jackson,* 390 U.S. 570, 581, 88 S. Ct. 1209, 1216, 20 L. Ed. 2d 138 (1968).

If these rights are not jealously guarded by the courts, and construed with librality, our system will erode into one which only favors the government – and those who control it. These are precisely the issues the Court is faced with in deciding whether to consider the case at bar.

A pre-sentence motion to withdraw a plea of guilty (as in this case) is addressed to the sound discretion of the United States District Court, but is governed by the standard originally articulated in *Kercheval v. United States,* 274 U.S. 220, 47 S. Ct. 528, 71 L. Ed. 1009, (1927), which held that such pre-sentence motions should be granted if "fair and just" for any reason. In applying this rule the District Courts have determined that pre-sentence

withdrawal motions should be freely granted generally. *Kadwell v. United States*, 315 F.2d 667 (9th Cir. 1963). In fact, the recent case of *United States v. Barker*, 514 F. 2d 208, (D.C. Cir. 1975) strongly suggests that pre-sentence withdrawal motions should be granted unless the "withdrawal is so unmerited that to allow it would be to deprive the guilty pleas of all meaning." (514 F. 2d. at 227). There is no such lack of merit in the pi esent appeal.

There are two distinct reasons why Petitioner's motion to withdraw his guilty plea was "fair and just" and should have bene allowed. First, Petitioner had ineffective assistance of counsel when he plead guilty. Secondly, he was faced with what seemed to be insurmountable problems which caused him to disregard his innocence and plead guilty. These factors stripped the plea of the requirement that it be made voluntarily as guaranteed by the Fifth Amendment to the United States Constitution. Either one of these would be a "fair and just" reason for allowing the withdrawal motion. However, coupled together, they should have been sufficient for the Court to allow a withdrawal of the guilty plea.

After Russell A. Smith was indicted on September 20, 1978, Herb Sucherman was appointed as his attorney by the Court on September 22, 1978. Smith first met with his court-appointed attorney on Monday, September 25, 1978. That meeting lasted approximately one (1) hour. The first thing Russell Smith told his court-appointed attorney at this first meeting was that *he believed he was innocent* of the charges. Sucherman explained to Smith that he was surprised at his court-appointment in that he didn't normally handle this type of case and that he had no federal trial experience. Sucherman further told him he had a choice between pleading not guilty or guilty and that he thought Smith would be "best off" if he could retain

someone with federal trial experience if he wanted to try the case. Sucherman further advised Smith that he had just found out about his appointment and that he would see what the U.S. Attorney's office was going to try to prove and they would then get back together and go over it all.

The next meeting took place on September 26th or September 27, 1978, and that meeting lasted about two (2) hours. At that meeting Sucherman related to Smith his conversations with Mark Elliston, Assistant United States Attorney, and Ronald Yates, Postal Inspector. Smith again asserted his innocence and offered evidence to Sucherman that he felt would show his innocence. Sucherman looked over these items, and said that at that point they wouldn't make any difference. Sucherman did not even keep these documents for further review.

Sucherman stated that the Government had a very strong case against him. Though Smith kept trying to say that he was innocent, Sucherman told him that if he pleaded innocent and got a lawyer who was competent in the case he still had a 95% chance of being convicted; and if he did not get a lawyer and continued with Sucherman representing him the odds of acquittal would even be less, because he had no experience in this area. Sucherman told Smith that basically he had two choices, either get all the money he could and retain a lawyer, or plead guilty to the plea bargain arrangement that had been made with Mark Elliston.

Smith never told Sucherman that he wanted to plead guilty because he was guilty. However, at that point Smith did indicate that he would plead guilty. Sucherman explained to Smith the very positive answers that would be required by the Court before the Court would accept his plea of guilty.

On September 28, 1978, Smith was to appear before Judges Hughes for arraignment. The plea bargain had been made with Assistant United States Attorney Mark Elliston. Sucherman met Smith in the hall outside the courtroom prior to the arraignment and Smith recalls that Sucherman told him that he must answer the Court's questions affirmatively or she would not accept his plea of guilty. Sucherman says that he did not tell Smith to lie to the Court, but Smith was told that he must indicate that his plea was made freely and voluntarily and that he must answer the Court's questions in a manner indicating his guilt even though he felt his innocence. Sucherman can only recall that he advised Smith that the plea would be accepted only if the person pleading guilty indicated that he was pleading guilty because he was guilty.

At that point Sucherman and Smith attended the arraignment proceeding and Russell Smith pleaded guilty to counts 1, 4, and 11 of the indictment. After the arraignment, Smith and his wife continued to maintain his innocence in conversations with Dan Stowers, the presentence investigations review officer. Smith also maintained his innocence to his court-appointed attorney.

On January 17, 1979, Defendant retained PHELPS, VAUGHN & GRAY to represent him in this matter and to file a motion to withdraw the plea of guilty previously entered. At that hearing, in addition to the matters relating to Russell Smith's representation by Herb Sucherman, which have been detailed previously, Smith indicated that he had pleaded guilty because of the financial situation and circumstances of his family and because he was under the mistaken impression that he could not seek another court-appointed attorney. The record reflects that Smith felt that he did not have a chance with Sucherman and he had been told by the U.S. Magistrate that he *could*

not change his attorneys. This was confirmed by Mr. Falk, a former associate of Petitioner. It was not until after discussions with Mr. Falk that Russell Smith sought the assistance of his present counsel and was advised that he might be able to withdraw his guilty plea.

Besides this "rail-roading" by his court-appointed attorney, there were many other considerations in his original decision to plead guilty. His family had no money in the bank. He had lost his job. His lawyer had advised him to plead guilty or hire a lawyer. Smith and his wife felt that if they sold every piece of furniture that they had and sold their home he would still only have a 5% chance of winning if he used these funds to hire a competent attorney. Using up these funds would leave his family, including three (3) children, (ages one, four, and six), penniless and without income. On the other hand, he was facing a maximum of fifty (50) years by pleading innocent. He felt that if he pleaded guilty and was sentenced to the penitentiary for eighteen (18) to twenty-four (24) months his family could sell these assets and use the money to live on during the period of his incarceration. As he testified, this was the deepest consideration that he made in pleading guilty.

Petitioner recognizes that there is no absolute right to withdraw a guilty plea. *United States v. Vasquez-Velasco,* 471 F. 2d 294 (9th Cir. 1973). But *Kadwell,* supra, recognizes the doctrine that absent substantial prejudice to the court or prosecution, withdrawal should be allowed whenever the Defendant presents a plausible reason. Here the Petitioner had two very plausible reasons for withdrawing his plea. The Defendant, not being trained in law, could not effectively evaluate the governments case and his chances of proving his innocence. His court-appointed attorney offered little hope or assistance – he

refused to even evaluate evidence Smith had in his possession which could prove his innocence.[1] Moreover, his family and financial situation made it even more difficult for him to make a rational decision.

There was a finding of hardship by the Trial Court but no finding of substantial prejudice. Although there was references that the government would have to reassemble its witnesses to try Smith, Petitioner submits that in light of the foregoing facts this was not sufficient prejudice to deny Smith his trial by jury. Absent an affirmative finding of prejudice the Court should certainly have allowed Smith to withdraw his plea. *United States v. Savage,* 561 F.2d 554 (4th Cir. 1977).

There was no evidence that the same witnesses would be called. The Postal Inspector made no statement as to whether any of the witnesses had died. There was no evidence as to whether or not it would be impossible to obtain their presence again or whether they would be unwilling to cooperate with the Government. There was no evidence that any of the witnesses had disappeared. There was no showing by the government that there was any question of immunity or of double jeopardy. In short, the government is saying that it does not want to go to the effort or expense of getting the witnesses back to Dallas to give Russell Smith an opportunity to prove his innocence.

We submit that such is not the law. No case exists which holds that inconvenience, expense, or difficulty alone is sufficient prejudice to prevent withdrawal. The law desperately needs clarification by the Court in this area.

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[1]It can easily be seen how the attitude of the court-appointed attorney was so cynical and unconcerned as to create the reasonable perception in Petitioners mind that his cause was hopeless and that he had no alternative other than to plead guilty.

If a showing of hardship amounts to a showing of prejudice the extent of which such a rule of law could be carried is devastating. Hardship is defined by *Webster's Dictionary* as "something that causes or entails suffering or privation." It is a synonym for the word "difficulty". It is submitted that it should be difficult for a government to be able to obtain a conviction of any person. If it is not difficult for a government to obtain a conviction, then most of the jurisprudence of the English-speaking world relating to the rights of persons accused of crimes since the time of the Magna Carta is totally meaningless.

The government will contend that Smith had every opportunity to withdraw his plea prior to the trial of a Co-Defendant. This is true; however, the circumstances had not changed. His attorney, whom he believed was the only one he could have[2] was still totally inexperienced and inadequate plus his family situation had not changed. Petitioner, although he maintained his innocence.[3] was precisely in the same situation he was in originally. The same factors controlled his decision.

It was not until he had spoken with new attorneys in January that he realized his innocence could be proven and that he could change attorneys! There was absolutely no showing that he had been attempting to get a preview of the governments case or what his sentence would be[4]. To the contrary, this is a case of the Petitioner finally being able to properly evaluate his chances of proving his in-

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[2]This is what the U.S. Magistrate had told him.

[3]*United States* v. *Joslin,* 434 F.2d. 526, 530 (D.C. Cir. 1970).

[4]This would not be a logical conclusion because he was found guilty and received a much stiffer penalty than Petitioner. This alone would make a reasonable man stand by his original plea if he were in fact guilty.

nocence and a realization that he could not live with his prior decision based on ineffective assistance of counsel and extreme financial and family pressures.

It would be proper for this Court to hear this case on not only the constitutional issues, but to provide guidance to the lower courts. There are many unanswered questions and conflicting interpretations of what is "just and fair" and what is prejudice to the government. Because the defendant has been deprived of his Sixth Amendment right to a jury trial if he is not allowed to withdraw his guilty plea, it would be appropriate for this Court to address these often asked questions. What is "fair and just"? What is prejudice? What is substantial prejudice? How does this differ from hardship? What did the Court mean by "disadvantage" in *Neely v. Pennsylvania,* 411 U.S. 954, 93 S. Ct. 1934, 36 L. Ed. 2d 416 (1973)? Does the government have to show an inability to present the case or merely inconvenience? If inconvenience is the test, then no Defendant would be able to withdraw his plea. The standards of review should be clearly defined and not left to the "hodge podge" interpretations propounded by the lower courts.

"The mere interest of the government in avoiding a full-blown trial cannot outweigh the interest of the Defendant, when he asserts sufficient reasons, valid on their face, for withdrawing a guilty plea", *Neely,* supra; *Santobello v. New York,* 404 U.S. 257, 30 L. Ed. 2d. 427, 92 S. Ct. 495 (1971).

II. The Decision Below Denies The Petitioner Due Process Of Law In Light Of The Highly Irregular Preparation Of The Transcript Of The Arraignment-Guilty Plea Proceeding.

Present counsel for the Defendant was employed long after the arraignment proceeding. After the filing of the withdrawal motion no copy of the transcript of the arraignment proceeding was provided counsel until the withdrawal hearing was in progress. Defendant had moved for a continuance with regard to this hearing for purposes of preparation but this motion was denied by Judge Hughes. His counsel was forced to rely on the Defendant's memory of the arraignment proceeding and information gleamed from the transcript after it was provided during the withdrawal hearing.

One of the critical matters asserted as grounds justifying the withdrawal of the guilty plea was the fact that the Defendant was not given sufficient information as to the nature of the charges against him. At the time of the withdrawal hearing Defendant's attorneys based a large portion of their presentation on the fact that the Record of the arraignment proceedings did not contain any evidence that the Defendant ever stated that he understood the charges against him. This stemmed primarily from the Defendant's failure to respond to a question from the Court as found on page 20 of the transcript.

After Defendant's Motion was denied and the appeal taken, Defendant prepared and filed his Appellant's brief relying heavily on the silence indicated above. After Defendant's brief had been filed and much time had elapsed (the government was given an extension of time within which to file its brief), the Defendant was served with a Motion For Correction Of The Record. The U.S. Attorney obtained an affidavit from the court reporter that

there was an omission in the transcript. Upon being served with this motion, Defendant filed a Motion In Opposition To The Correction Of The Record, indicating the prejudice alleged here, and further indicating that the Defendant, in reliance on such cases as *Hardy v. United States,* 375 U.S. 277, 11 L. Ed. 2d. 331, 84 S. Ct. 424 (1964), and *United States v. Selva*, 559 F. 2d. 1303 (5th Cir. 1977), objected to these matters being added to the record at this late date. This motion further indicated that the Defendant wished to file a brief in the trial court. Defendant was assured that a hearing would be set on this motion allowing ample time for the filing of a brief.

Thereafter, while awaiting notice of the setting of a hearing of the Government's Motion, the Defendant was served with the supplemental record containing the Government's Motion For Correction Of The Record and the Court's order thereon. (App. 9a).

Defendant asserts that this action of the Court without a hearing, when the Defendant had filed an opposition indicating the desire to file a brief and the desire to be heard, constitutes a deliberate attempt on the part of the United States Attorney's Office, and the trial court, to prejudice any possible chance that this Defendant might have had for a reversal on appeal.

In the recent decision in *United States* v. *Dayton,* 604 F.2d. 931, 938 (5th Cir. 1979), the Court states:

> "We therefore conclude that a failure to record Rule 11 proceedings completely and verbatim will ordinarily require reversal on appeal. Indeed, matters could scarcely be otherwise, since it will be a rare case and one that we cannot presently envision in which we look beyond the transcript of the arraignment in passing on an appeal after a guilty plea."

Although this transcript was corrected prior to the time of consideration by this Court, the underlying policy evidenced by this language, and by the cases cited above, points out the fallacy of requiring a Defendant's fate to be put in the hands of people who do not have basic knowledge of what transpired at the arraignment proceeding. It makes no difference whether the matters contained in the record really took place—rather it is the fact that Defendant's present attorneys, who were not his attorneys at the arraignment proceeding, did not have the benefit of that question and answer in determining the matter to present to the Court on the withdrawal motion and in preparing their brief in the Fifth Circuit.

To affirm Defendant's conviction in the face of this flagrant violation of due process is the logical precursor of a rule that a Defendant is entitled to no transcript on appeal but must rely on his memory as to what took place at the arraignment proceeding—coupled with a presumption by the appellate court that the trial court properly complied with Rule 11. Such is clearly not the law and the lower courts decision should be reversed.

CONCLUSION

As all attorneys and judges with experience in criminal practice realize, guilty pleas are often made for reasons other than actual guilt. In this case, Petitioner was ineffectively represented by counsel, and this, coupled with the very difficult financial and family consideration amounted to an involuntary plea which is contrary to due process of law.

> A man may confess guilt to shield another, "take the rap." He may confess guilty through mental aberration; each unsolved killing in the morning newspaper is followed by distraught or delighted telephone calls to the police insisting "It was one of my best murders." He may confess

guilt through ignorance of the critical fact: the man he struggled with and left for dead, recovered. He may confess guilt in desperation—alone, impoverished, overawed, by the power aligned against him, incapable of defending himself, nothing left but to confess, hoping and begging for mercy. He may confess under pressures that stronger, bolder, more hardened, guiltier men might resist.

Some men, perhaps most, who confess or even "feel" guilty are guilty, morally and legally. Yet it is not invariably so. And it is some mark of a civilized society that it will take pains to make sure before condemning anyone. The pains that we take to make sure go by the lawyer's name of "procedure," to some by the dirty word "technicalities" (as indeed they are) as though a legal technicality like a technical knockout were a poor substitute for the genuine article. Any system of justice has its procedures, its technicalities, the details by which it takes laws out of the books and puts them to work. It is often only a choice of procedures that separates savagery or tyranny from civilized life. Headhunting is a procedure; so is the rack. Whether you are presumed guilty when charged with crime or presumed innocent until proved guilty is a technicality.

Our particular choice of technicalities distinguishes us from men who are not free.

(The Conscience of a Lawyer, David Mellinkoff, West Pub. Co., St. Paul, Minn., 1973, pp. 149-153.)

For all the foregoing reasons, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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January 12, 1980

APPENDIX
ORDERS AND OPINIONS SOUGHT
TO BE REVIEWED

United States Court of Appeals

FIFTH CIRCUIT

Gilbert F. Ganucheau **OFFICE OF THE CLERK** Tel 504-589-6514
Clerk 800 CAMP STREET
New Orleans, LA. 70130

December 13, 1979

TO ALL PARTIES LISTED BELOW:

No. 79-1443 & 79-5118 – U.S.A. vs. RUSSEL A. SMITH

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

GILBERT F. GANUCHEAU,
Clerk

By _____
Deputy Clerk

cc: Mr. Michael J. Vaughn
Mr. D. Mark Elliston

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-5118
Summary Calendar *

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RUSSELL A. SMITH,
Defendant-Appellant.

* * * * * * * * * * *

No. 79-1443

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RUSSELL A. SMITH,
Defendant-Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS

(OCTOBER 23, 1979)

Before GOLDBERG, RUBIN and POLITZ, Circuit Judges. PER CURIAM:

A defendant who pleaded guilty and was later offered an opportunity to withdraw his plea, changed his mind

* Fed. R. App. P. 34(a): 5th Cir. R. 18.

after his codefendants were tried, convicted and sentenced. He now seeks to overturn the district court's refusal to let him set aside the plea. We decide that the district court followed Fed. R. Crim. P. II in accepting his plea, that the plea was entered voluntarily and that the court did not abuse its discretion in refusing to allow him belatedly to change his mind. Therefore, we affirm the judgement.

In September 1978, approximately one week after he was indicted for allegedly using various fraudulent means to sell distributorships for a self-watering flower pot, Smith pleaded guilty to three counts of a ten count indictment. The other counts were dismissed without prejudice. In December 1978, four codefendants were tried and convicted in a six-day trial at which twenty-five witnesses from eleven states testified.

In January 1979, four months after he entered the plea and before he was sentenced, Smith moved to withdraw his plea. He alleged that he was innocent of the charges and furthermore that his guilty plea was not in compliance with Rule II. Before sentencing Smith the court held a hearing and denied his motion.

At the hearing Smith testified that he had pleaded guilty because his appointed counsel was inexperienced and had predicted his chances of success at trial as very low. Smith further alleged that he had always maintained his innocence, but that his appointed counsel convinced him that he would need expensive retained counsel to have even a slight chance of acquittal. With no money and no predictable chance of success, he claimed, he pleaded guilty.

Smith's former attorney testified that he had had no federal trial experience before being appointed but that he had told Smith he could get one or two more experienced

lawyers to help him in the trial. He also stated that he had predicted Smith's chance of acquittal as very low and the cost of retained counsel as at least $5,000. Smith's counsel stated that Smith was convinced that he was not guilty in the beginning, but that his attitude became less strong after hearing the evidence. The attorney also revealed that evidence examined after Smith's plea convinced the prosecutor that Smith's culpability was less than the prosecutor had believed when Smith was indicted.

The trial judge found, however, that Smith was not a credible witness and that his counsel was competent and gave him a realistic picture of the situation. The judge also found that Smith was given an opportunity to withdraw his plea before the trial, and that to retry the case would work a great hardship on the government.

A motion to withdraw a guilty plea, F. R. Crim. P. 32(d), is addressed to the court's sound discretion, United States v. Hough , 5 Cir. 1977, 561 F.2d 594, and the rule allowing a defendant to withdraw a plea of guilty before sentence is imposed should be construed liberally. *See* United States v. Klein, 5 Cir. 1977, 560 F.2d 1236, 1241, *cert. denied* 1978, 434 U.S. 1073, 98 S.Ct. 1259,____L.Ed.2d____. However, Smith's testimony at the hearing on the motion to withdraw his guilty plea contradicts the assertions he made when he entered his plea, and ordinarily he should not now be allowed to refute testimony given under oath. *See* United States v. Sanderson, 5 Cir. 1979, 595 F.2d 1021. Moreover, the trial judge found Smith not to be believable in his testimony about his innocence and his relationship with his appointed counsel. We find that the trial judge acted within the discretion allowed by the law in refusing to permit withdrawal of the plea.

Finally, we conclude that the guilty plea proceedings complied with Rule 11. United States v. Dayton, 5 Cir. 1979, en banc, ____ F.2d ____, (slip op. at ____).

AFFIRMED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 79-1443
79-5118
Summary Calendar

D.C. Docket No. CR-3-78-230

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

RUSSELL A. SMITH,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
OR THE NORTHERN DISTRICT OF TEXAS

Before GOLDBERG, RUBIN and POLITZ, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 23, 1979

ISSUED AS MANDATE:

OTHER ORDERS, JUDGMENTS, AND OPINIONS
IN THE CASE

United States Court of Appeals

FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

OFFICE OF THE CLERK

600 Camp Street
New Orleans, La. 70130
Telephone 504-589-6514

MARCH 8, 1979

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 79-1443 and 79-5118 – U.S.A. vs. RUSSELL A. SMITH

The following action has this day been taken in the above case:

( ) Motion to proceed on the original record granted.

( ) Motion to proceed on the original record and typewritten brief granted.

( ) Motion to consolidate granted.

( ) Motion to supplement or correct record granted.

( ) Motion for leave to file supplemental brief granted.

( ) Motion for leave to file brief amicus curiae is granted.

( ) Motion for leave to file brief in preliminary typewritten form is granted.

( ) Joint motion as to time for filing briefs granted.

( ) Order enclosed has been entered.

(X) The unopposed motion of appellant to consolidate the referenced appeals has been granted.

cc: Mr. Michael J. Vaughn
Mr. Kenneth J. Mighell
Mr. Rodney M. Phelps

EDWARD W. WADSWORTH, Clerk

By /s/ Claudia R. Nides
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA	*	
v.	*	CRIMINAL NO. 3-78-230
	*	
RUSSELL A. SMITH	*	

ORDER CORRECTING THE RECORD

The court reporter, Carl Black, has reviewed his notes and tape recording of the arraignment proceeding on September 28, 1978, of defendant RUSSELL A. SMITH and such review has demonstrated an inaccuracy in the official transcription of such proceedings. The official transcription of those proceedings is inaccurate at page 20. The inaccurate transcription reads as follows:

> THE COURT: All right. Now, Mr. Smith, do you think you understood the charge as I stated it to you?
>
> MR. REA: I did, Your Honor.

Accurately the record should read:

> THE COURT: All right. Now, Mr. Smith, do you think you understood the charge as I stated it to you?
>
> MR. SMITH: Yes, Your Honor.

THE COURT: And, Mr. Rea, do you think you understood the charge as I stated it to you?

MR. REA: I did.

IT IS THEREFORE ORDERED that the record should be corrected so as to reflect the proceedings accurately.

ENTERED THIS 11 day of July, 1979.

/s/ Sarah T. Hughes
SARAH T. HUGHES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

UNITED STATES OF AMERICA	X	U.S. DISTRICT COURT NORTHERN DISTRICT OF TEXAS FILED FEB 8, 1979 JOSEPH McELROY, Jr., Clerk BY: /s/ Johnson Deputy
v.	X	
FLOYD R. BELL	X	
RUSSELL A. SMITH	X	
WILLIAM A. REA, II	X	
MARCIA ANN BINGHAM also known as ANN EVANS	X	CRIMINAL NO. 3-78-230
JIMMIE A. McKELVY	X	
MICHAEL A. TORIGIAN	X	
TROY W. GILLESPIE	X	

ORDER

The Motion of RUSSELL A. SMITH, Defendant herein, for permission to withdraw his plea of guilty having been heard, together with the arguments of counsel, and the Court being fully advised, it is

ORDERED that the Motion of Defendant be and hereby is DENIED.

DATED: February 8, 1979.

/s/ Sarah T. Hughes
UNITED STATES DISTRICT JUDGE

United States District Court
NORTHERN DISTRICT OF TEXAS AT DALLAS

United States of America

v.

RUSSELL A. SMITH

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
FEB 9, 1979
JOSEPH McELROY, JR., CLERK
By: /s/ Johnson
Deputy,

Docket NO. CR3-78-230

JUDGEMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date: February 9, 1979

[ ]WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Rodney M. Phelps (name of counsel)

GUILTY, and the court being satisfied that there is a factual basis for the plea,

There being a finding of:

[ ] NOT GUILTY. Defendant is discharged
[X] GUILTY.

Defendant has been convicted as charged of the offense(s) of conspiracy to commit offenses against the United

States, to wit: to violate Title 18 U.S.C. Section 1341, as charged in count 1, and Section 1343, as charged in count 11 (devising a scheme and artifice to defraud), a violation of Title 18, U.S.C., Section 371, as charged in counts 1 and 11; and, of causing an envelope to be delivered by the United States Postal Service for the purpose of executing the aforesaid scheme and artifice to defraud, a violation of Title 18, U.S.C., Sections 2 and 1341, as charged in count 4 of the 15-count indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contra was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years on each of counts 1 and 11, count 11 to run concurrently with count 1.

IT IS ADJUDGED that on count 4 the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of two (2) years. Said period of imprisonment is to run consecutively to sentence of imprisonment imposed on counts 1 and 11.

IT IS ORDERED that upon motion of the United States Attorney counts 2,3,5,6,7, 8 and 9 of the indictment are hereby dismissed, without prejudice.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum

probation period of five years permitted by law, may issue a warrant and revoprobation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends,

SIGNED BY

/s/Sarah T. Hughes

SARAH T. HUGHES

Date: February 9, 1979

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.